The Law Commission

Working Paper No 48
Family Law
Declarations in Family Matters
17 April 1973

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THE LAW COMMISSION

SECOND PROGRAMME - ITEM XIX

FAMILY LAW

WORKING PAPER NO: 48

DECLARATIONS IN FAMILY MATTERS

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I. INTRODUCTION

1. Work on the codification of family law has led us to consider the problems associated with the remedy known to English family law as 'the declaration'.

2. The remedies of divorce, nullity and judicial separation are in an important respect declaratory in that each includes or implies a declaration as to the validity or invalidity of the marriage. But a need for additional declaratory relief early made itself felt. The Legitimacy Declaration Act 1858, sections 1 and 2, conferred upon the Court for Divorce and Matrimonial Causes the power to make declarations of legitimacy or illegitimacy of certain persons, to make decrees declaratory of the validity or invalidity of certain marriages and to make decrees declaratory of a person's right to be deemed a natural born British subject. The Act closely defined the persons to whom this relief was available and the marriages in respect of which it was possible to obtain such a declaration. The Act also established a number of safeguards designed to ensure that the Attorney-General and persons who might be affected by such decrees should have an opportunity of being heard. The law, substantially as stated in the Act of 1858, has survived a number of statutory restatements[1] and is now

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1. The Legitimacy Declaration Act 1858, ss.1 and 2 were repealed by the Supreme Court of Judicature (Consolidation) Act 1925, and s. 188 of the 1925 Act while substantially re-enacting ss. 1 and 2, abolished the court's power to make declarations of illegitimacy or invalidity of a marriage s. 188 of the 1925 Act and s. 2 of the Legitimacy Act 1926 were repealed by the Matrimonial Causes Act 1950 and replaced with verbal amendments by s. 17 of that Act; s. 17 of the 1950 Act was repealed by the Matrimonial Causes Act 1965 and replaced by s. 39 of that Act.

to be found in the Matrimonial Causes Act 1965, section 39. The Legitimacy Act 1926, section 2, empowered the court to make a declaration of legitimacy of legitimated persons and applied to proceedings for such declarations the safeguards for the public interest and individuals affected which are to be found in the Legitimacy Declaration Act 1858. This power to declare a legitimation is also now included in section 39 of the 1965 Act.

3. It might appear from a consideration of the statutory history that the legislature had decided that no declaratory relief other than that provided by statute was to be available in family matters. Nevertheless, there is now a substantial number of decided cases in which without resort to the statute the courts have granted declarations of matrimonial status and of legitimacy. The basis of this case law is not beyond challenge. R.S.C., Order 15, rule 16, provides that the Supreme Court has a power to make "binding declarations of right" but the rule is purely procedural and gives no indication as to the scope or extent of the power, which is part of the court's inherited inherent jurisdiction. Since the ecclesiastical courts did not, it seems, grant declarations of status other than declarations of nullity, it is at least open to doubt whether the courts have any inherent jurisdiction to grant such declarations. Nevertheless, the courts have acted upon the basis that such a power exists.[2]

4. In doing so, the courts have acceded to a widely held view that the statute law is too restricted. Unfortunately, the case law that has developed lacks certainty, is inconsistent, and has failed to develop the sort of safeguards for the interest of third parties and the public that are needed when the court's final order is to be binding in rem.

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2. See, in particular, the judgment of Denning L.J. in Har-Shefi v. Har-Shefi [1953] P. 161, 169, C.A.

5. We, therefore, suggest that the existing law may be in need of reform. The statute law has an archaic ring about it, is restricted in scope, is complex, and has clearly failed to provide a satisfactory code of relief. The case law, in attempting to meet the need unsatisfied by the statute, has fallen into disarray and lacks certain essential safeguards. In this Paper we set forth some provisional proposals for a modern code of declaratory relief in family law to take the place of the existing statute and case law. Our proposals are limited in scope, and if implemented, they would take the place of section 39 of the 1965 Act which we propose for repeal. Their only impact upon the court's inherent jurisdiction to make binding declarations of right would be that, so far as concerns matrimonial status and legitimacy, the declarations available would be limited to those which will be provided for by statute.

II. EXISTING LAW

6. Declarations in family matters are made at present:-

(1) under the Matrimonial Causes Act 1965, section 39;

(2) at the discretion of the court under R.S.C., Order 15, rule 16;

(3) in a jactitation suit;

(4) under the Greek Marriages Act 1884.

Jactitation and the Greek Marriages Act are special cases and are so treated at the end of the Paper.[3] Our principal concern is with (1) and (2). In our consideration of these two classes of declaratory relief we shall keep particularly in mind the decree of nullity of a void marriage. Such a decree is in effect the converse of a declaration of validity of marriage made under section 39; both are concerned with the same problem, namely, whether a marriage was or was not valid, and it may well be right that each should be governed by the same rules in the matters of procedural safeguards, applications by third parties and applications after the death of a spouse.

(1) Declarations under the Matrimonial Causes Act 1965, s. 39

7. Under the Matrimonial Causes Act 1965, section 39, the following applications for declaration of status may be

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3. See paras. 63-66 and 67-69 below.

made:

(1) Any person who

(a) is a British subject or whose right to be deemed a British subject depends wholly or in part on his legitimacy or the validity of any marriage, and

(b) is domiciled in England or Northern Ireland or claims any real or personal estate in England may apply for a declaration that

(i) he is the legitimate child of his parents; or

(ii) his marriage or that of his parents or that of his grandparents was a valid marriage (s. 39 (1)).

(2) Any person may apply for a declaration that he or his parent or remoter ancestor[4] has been legitimated under the Legitimacy Act 1926 or recognised under s. 8 of that Act as legitimated (s. 39 (2)).

(3) Any person who is domiciled in England or Northern Ireland or claims real or personal estate in England may apply for a declaration that he is to be deemed a British subject (s. 39 (4)).

8. Leaving aside for the present the jurisdictional criteria,[5] it will be seen that the declarations available

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4. Ancestor means lineal progenitor (not, e.g., an uncle): Knowles v. A.-G. [1951] P. 54.

5. These differ according to the type of declaration sought.

under section 39 are -

(1) that the applicant is legitimate;

(2) that the applicant or any ancestor of his has been legitimated;

(3) that the applicant's marriage or that of his parents or of his grandparents was a valid marriage;

(4) that the applicant is a British subject.

9. Except in the case of (2) (legitimation), where the application can be made either to the High Court or to the county court[6], all applications under section 39 must be made to the High Court. The Attorney-General[7] must be made a party in every case[8] and the applicant must apply for directions[9] as to what other persons must be given notice of the application so as to enable them to oppose it if they so desire; care must be taken to have before the court everybody whose interests may be affected.[10] The hearing

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6. The county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may and, if so ordered by the High Court must, transfer the application to the High Court: s. 39 (3).

7. It was said in De Gasquet James v. Mecklenburg-Schwerin [1914] P. 53, 70, that the Attorney-General becomes a party to protect the interests of the Crown and the public.

8. Section 39 (6).

9. Section 39 (7); R.S.C., Order 90, rule 14 (4).

10. Re A.B.'s Petition (1927) 96 L.J.P. 155. In the case of a legitimacy application the next-of-kin of the putative father may be persons whose interests may be affected: ibid For practice, see R.S.C., Order 90, rules 14 and 15 and C.C.R. Order 39; the applicant must give particulars by affidavit of every person whose interests may be affected: ibid.

may take place in camera and the restrictions on reporting contained in the Judicial Proceedings (Regulation of Reports) Act 1926 apply.[11] It is provided that the court "shall make such decree as it thinks just" and the decree shall be binding on the Crown and all other persons, but so that the decree is not to prejudice any person

(a) if obtained by fraud or collusion; or

(b) unless that person has been given notice of, or was a party to, the proceedings or claims through such a person.[12]

10. The court's power under section 39 is limited to making declarations which fall squarely within the terms of the section.[13] Thus, it has been held that there is no power under this section to declare that a marriage still subsisted on a specified date[14] or to declare that any person other than the applicant is legitimate,[15] or that any person is

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11. Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s. 2(3).

12. Section 39 (5).

13. The only decision which would seem to run counter to this proposition is Starkowski v. A.-G. [1952] P. 135; [1952] P. 302, C.A.; [1954] A.C. 155 (an application under what is now s. 39) in which the marriage of the petitioner's parents was declared invalid and the petitioner was declared not to have been legitimated (this was the form of the declaration made: Case No. 4308 of 1951), but it is questionable whether this, though in the form of a declaration, was intended to be anything more than a statement of the consequences flowing from the dismissal of the application.

14. Aldrich v. A.-G. [1968] P. 281.

15. Mansel v. A.-G. (1877) 2 P.D. 265 (no power to determine legitimacy of person other than the applicant); Warter v. Warter (1890) 15 P.D. 35 (no power to make legitimacy declaration otherwise than in accordance with the provisions of the Legitimacy Declaration Act 1858; application to declare applicant's father legitimate refused); Aldrich v. A.-G. [1968] P. 281 (application to declare applicant's daughter legitimate refused).

illegitimate[16], or that any person other than the applicant or an ancestor of his was legitimated.[17]

(2) Declarations under the inherent jurisdiction of the court

11. In addition to its powers under the Matrimonial Causes Act 1965, section 39, the High Court has claimed and exercised power to make declarations as to matrimonial status, using the procedure of R.S.C., Order 15, rule 16, which provides that -

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

The rule does no more than make clear that the rules of court do not prevent the exercise of a declaratory jurisdiction: it does not create any such jurisdiction or specify what declarations are available. One must look to the cases to discover the nature of the jurisdiction and the declarations

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16. Mansel v. A.-G. (1877) 2 P.D. 265; (1879) 4 P.D. 232 (application to declare brother illegitimate struck out); B. v. A.-G. [1967] 1 W.L.R. 776 (declaration that A was not the legitimate child of B refused).

17. Knowles v. A.-G. [1951] P. 54 (application to declare uncles legitimated refused).

that a court can make.

12. Declarations have been made -

(a) that a foreign decree has validly dissolved[18] or annulled[19] a marriage,

(b) that a foreign divorce[20] or nullity[21] was not valid in English law.

It has been held that there is no separate power under Order 15, rule 16, to make a declaration of legitimacy[22] or validity of marriage[23] and that such declarations must be made under section 39; it has also been held[24] that there is no power under Order 15, rule 16, to make a declaration of invalidity of marriage and that such a declaration can be only by means of a decree of nullity.

13. Nevertheless, the position is not free from doubt as in a number of cases the court has entertained applications under Order 15, rule 16, to declare marriages

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18. Har-Shefi v. Har-Shefi (No. 1) [1953] P. 161, C.A.; Wood v. Wood [1957] P.254, C.A.; Lee v. Lau [1967] P. 14.

19. Merker v. Merker [1963] P. 283; Abate v. Abate [1961] P. 29.

20. Macalpine v. Macalpine [1958] P. 35; Middleton v. Middleton [1967] P. 62; Re Meyer [1971] P. 298.

21. Lepre v. Lepre [1965] P. 52, 57.

22. Knowles v. A.-G. [1951] P. 54; Aldrich v. A.-G. [1968] P. 281.

23. De Gasquet James V. Mecklenburg-Schwerin [1914] P. 53; see fn. 25 below.

24. Kassim v. Kassim [1962] P. 224; Corbett v. Corbett [1971] P. 83.

valid or invalid. Thus, the court has entertained applications for declarations that "the marriage remains a valid and subsisting marriage,"[25] that "her marriage to the respondent subsisted and that her status was that of a married woman"[26] and that "the marriage subsisted on" a specified date.[27] Moreover, in Kunstler v. Kunstler[28] the court entertained an application for a declaration that a marriage was initially valid and in Woyno v. Woyno[29] actually made such a declaration; in Gray v. Formosa[30] the court entertained an application "that the marriage should be declared a nullity" and in Merker v. Merker[31] "that it should declare her marriage

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25. Garthwaite v. Garthwaite [1964] P. 356, C.A. But see s. 21 of the Supreme Court of Judicature (Consolidation) Act 1925 which confers on the High Court jurisdiction "with respect to declarations of legitimacy and of validity of marriage, as is hereinafter in this Act provided". This is a reference to s. 188 of the 1925 Act which became, with minor amendments, s. 17 of the Matrimonial Causes Act, 1950, and s. 39 of the Matrimonial Causes Act 1965. In Aldrich v. A.-G. [1968] P. 281, Ormrod J. relied on that section in holding that there was no power to grant declarations of legitimacy outside the scope of s. 39 of the Matrimonial Causes Act 1965. This decision seems to imply that the same is true of declarations relating to the validity of a marriage. However, it may be, as was tentatively suggested in Collett v. Collett [1968] P. 482, 494 and Aldrich v. A.-G. [1968] P. 281, 293, that there is a distinction between a declaration that a marriage is still subsisting and a declaration that it was valid ab initio.

26. Qureshi v. Qureshi [1972] Fam. 173.

27. Re Meyer [1971] P. 298; but a similar declaration was refused in Aldrich v. A.-G. [1968] P. 281.

28. [1969] 1 W.L.R. 1506.

29. [1960] 1 W.L.R. 986.

30. [1963] P. 259, C.A. See also Starkowski v. A.-G. (referred to in fn. 13) where a marriage was declared invalid.

31. [1963] P. 283.

not to have been validly celebrated according to English law".

14. The jurisdictional criteria for the grant of relief under R.S.C., Order 15, rule 16, are far from clear. The court has exercised the jurisdiction:-

(1) where, by reason of the domicile or residence of the parties or of one of them, the Ecclesiastical Court had jurisdiction to grant matrimonial relief available in that court,[32] i.e. nullity, judicial separation and restitution of conjugal rights,[33] or, more accurately, if the court would have jurisdiction[34] to grant such relief if the petitioner were entitled to the declaration sought;[35]

(2) where the wife petitioner has been able (or would be able if entitled to the declaration sought) to bring herself within the statutory jurisdiction

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32. Garthwaite v. Garthwaite [1964] P. 356, C.A.; Qureshi v. Qureshi [1972] Fam. 173.

33. The remedy of restitution of conjugal rights was abolished by the Matrimonial Proceedings and Property Act 1970, s. 20, which came into force on 1 January 1971.

34. As where a wife seeks a declaration that her marriage has been terminated which, if it be the case, entitles her to acquire a separate domicile and thereby invoke the court's jurisdiction on the ground that she is domiciled in England: Har-Shefi v. Har-Shefi [1953] P. 161, C.A.; Merker v. Merker [1963] P. 283.

35. Merker v. Merker, supra at 291; Lepre v. Lepre [1965] P. 52, 57.

of the court under the Matrimonial Causes Act 1965, s. 40;[36]

(3) apparently also, where determination of the validity of a foreign decree was a necessary step in proceeding to adjudication on a matter within the jurisdiction of the court.[37]

In the case of a marriage void ab initio the Ecclesiastical Court had jurisdiction to pronounce a decree of nullity if the marriage had taken place in England[38] and it may be that there is jurisdiction to make a declaration if the marriage had taken place here: this was submitted in Abate v. Abate,[39] but the ground on which jurisdiction was assumed is not stated.

15. An application under Order 15, rule 16, is by petition in the High Court[40] and the Matrimonial Causes Rules apply with

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36. Garthwaite v. Garthwaite [1964] P. 356, C.A. Danckwerts and Diplock L.JJ thought jurisdiction existed if the petitioner was within either s. 40(1) (a) or (b), (see at 385-386, 390, 391); but Willmer L.J. appears to have thought that jurisdiction was limited to the case where the wife was within s. 40(1) (a): see pp. 378, 384.

37. Lepre v. Lepre [1965] P. 52 (the petition was (1) for a declaration that a foreign nullity decree was invalid and (2) for divorce).

38. Ross Smith v. Ross Smith [1963] A.C. 280.

39. [1961] P. 29; but see Garthwaite v Garthwaite [1964] P. 356 where the Court of Appeal declined jurisdiction to make a declaration of status even though the marriage had been celebrated in England.

40. Only the High Court can make a bare declaration as to matrimonial status; the divorce county court may do so only where the petitioner seeks a declaration ancillary to the main relief claimed, as where it is necessary to adjudicate on the validity of a marriage or divorce or as a necessary preliminary to consideration of a prayer for divorce or nullity: Practice Direction [1971] 1 W.L.R. 29.

the necessary modifications.[41] The person immediately affected by the proposed declaration is made respondent and where there is no such person, as where he is dead, leave must be obtained to proceed without a respondent.[42] There is no provision - as there is in the case of an application under section 39[43] - for giving notice of the application to persons who might be affected by the proposed declaration, though the court may ask the Queen's Proctor to make arrangements for counsel to appear as amicus curiae[44] and may direct that interested parties be served and given an opportunity to take part in the proceedings.[45] The hearing of the petition is in open court and the restrictions on publication applicable to proceedings under section 39 do not apply. The declaration operates in rem[46] and binds persons who were not parties to the proceedings nor aware of their existence. The power to make declarations is discretionary[47] and the court will not decide hypothetical or academic questions.[48]

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41. Order 90, r. 15.

42. Re Meyer [1971] P. 298 (wife's application after husband's death to have foreign divorce declared to be invalid).

43. See para. 9 above.

44. See, for instance, Kunstler v. Kunstler [1969] 1 W.L.R. 1506 and Re Meyer [1971] P. 298 where this was done.

45. This was done in Kunstler v. Kunstler, supra; in that case the husband asked for a declaration that his marriage to his second wife was valid, the validity of the second marriage being dependent on whether the first marriage had been validly dissolved, and the court adjourned the petition for an application to be made for directions relating to the joinder of the first wife. See also R.S.C. Order 15, rule 6 and Matrimonial Causes Act 1965, s. 44.

46. Lepre v. Lepre [1965] P. 52, 62; Kunstler v. Kunstler, supra at 1510.

47. Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. [1921] 2 A.C. 438; R.S.C., Order 90, rule 13(3)(b).

48. Re Barnato [1949] Ch. 258, C.A.

III. PROVISIONAL PROPOSALS

Defects of the present law

16. The existing law contains, in our view, at least four unsatisfactory features -

(1) There is uncertainty as to the type of declarations which can be made under the inherent jurisdiction (paras. 12-13).

(2) Whereas declarations under section 39 have "built-in" safeguards,[49] such as giving notice to persons who might be affected by the declaration, declarations under Order 15, rule 16, though operating in rem, have no safeguards other than the discretionary powers of the court.[50]

(3) The jurisdictional criteria to make declarations under section 39 are anomalous; for instance, any person irrespective of his nationality, domicile or residence can apply for a declaration that he or any ancestor of his has been legitimated by reason of his parent's marriage subsequent to his birth and, in order to succeed, he must establish that his parents' marriage was valid; but if that person wants a declaration that his parents' marriage was valid and that he is legitimate, he must either be a British subject or show that his right to be a British subject depends on

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49. See para. 9 above for a description of these safeguards.
50. See para. 15 above.

his legitimacy or the validity of any marriage and, in addition, he must be either domiciled in England or Northern Ireland or claim real or personal estate in England; unless he can bring himself within these jurisdictional criteria, there appears to be no power to make a declaration of legitimacy or validity of marriage.[51]

(4) It is not possible to state with confidence what are the jurisdictional criteria enabling the court to make declarations under Order 15, rule 16 (para. 14).

These unsatisfactory features are due in part to the outdated complexities of the statute (section 39), in part to the lack of any principle to guide the exercise of the inherent jurisdiction of the court (Order 15, rule 16) and in part to uncertainty as to the true relationship between the statutory and discretionary powers to grant relief. We propose, therefore, that legislative proposals should be formulated to take the place of the existing hotchpotch of statutory and discretionary relief. In effect the statute will determine the declaratory relief available in matters of matrimonial status and legitimacy.

17. Provisionally, we propose a new statutory provision to deal comprehensively with declarations as to matrimonial status and legitimacy. The statute should specify what declarations can be made, their effect (i.e. whether binding in rem or only in personam), the circumstances in which they can be made and the safeguards thought to be necessary. It is, accordingly, necessary to consider within this field:

(1) what declarations can be made (paras. 18-36);

(2) whether declarations should operate in rem or their effect be limited to binding the parties to the proceedings (paras. 37-38);

51. See paras. 7 and 12 above.

(3) whether declarations should be in the discretion of the court or obtainable as of right (para. 39);

(4) whether the dismissal of an application should have any declaratory effect beyond binding the parties to the proceedings (paras. 40-41);

(5) whether persons other than the parties to a marriage should be entitled to apply for a declaration of validity of the marriage (paras. 23, 42).

(6) whether an application for a determination as to the validity of a marriage should be available after the death of a spouse (paras. 43-46);

(7) what should be the grounds of jurisdiction enabling a court to entertain a claim for a declaration (paras. 47-49);

(8) what procedural safeguards should be provided, and whether those safeguards should be extended to nullity proceedings (paras. 50-54);

(9) whether ancillary relief should be available on the grant of a declaration (paras. 55-56);

(10) what court should hear the application (paras. 57-58).

(1) The Declarations proposed

18. We propose that the court should be empowered by statute to make the following declarations:-

(i) that the applicant's marriage was, when celebrated, a valid marriage (paras. 22-23);

(ii) that a foreign decree of nullity or divorce has or has not validly annulled or dissolved the applicant's marriage (paras. 30-31);

(iii) that the applicant is legitimate or has been legitimated; we invite views as to whether the applicant should be able to apply for a declaration that any ancestor of his was legitimate or has been legitimated, or whether both legitimacy and legitimation declarations should be limited to the applicant's own status (para. 32). We also raise the question whether it should be possible to obtain a declaration as to the parent-child relationship in cases where the applicant does not claim the status of legitimacy or legitimation (para. 34).

It follows that we provisionally take the view that the new statutory provision should not confer upon the court power to make any of the following declarations:-

(a) a declaration that the applicant is a British subject (paras. 35-36);

(b) otherwise than in nullity proceedings, a declaration that a marriage was invalid (para. 24);

(c) any declaration as to a marriage other than the applicant's marriage (para. 23).

19. Our provisional view is that the court should not be empowered to make a declaration of invalidity of marriage in the case where the marriage has taken place in England and there is no jurisdiction to petition for nullity.[52] We would, however, welcome comment on this question.

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52. Paras. 25-27 below.

The case for limiting declarations as to matrimonial status

20. The declarations as to status which are, or may be obtainable under the existing law can be classified as follows:-

(a) that a marriage was initially valid;[53]

(b) that a marriage was initially void;[54]

(c) that a marriage subsists or has ceased to subsist;[55]

(d) that a foreign divorce or nullity is valid or invalid in English law[56].

21. The effect of our proposals would be that declarations under (a) would remain available but would be confined to declarations about the applicant's own marriage; declarations under (b) would no longer be available except in nullity proceedings; and declarations under (c) would no longer be available as a separate category but would be subsumed under (d).

(i) Declarations of initial validity of marriage

22. Declarations of the initial validity of marriage can now be obtained under section 39 in respect of the applicant's own marriage and in respect of the marriage of his parents or grandparents. The validity of the applicant's own marriage must, we think, continue to be the subject of a declaration.

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53. Paras. 7(1), 8 and 13 above.

54. Para. 13 above, but the position is not free from doubt: see para. 12 above.

55. Para. 13 above.

56. Para. 12 above.

Such a declaration, namely that the applicant's marriage was valid, is the converse of a decree of nullity of a void marriage, which is in effect a declaration that the applicant's marriage was invalid; if he is to be entitled to ask for the latter, he should also be entitled to ask for the former. In other words, if the applicant's own status is in doubt, the applicant should be able to have the doubt judicially resolved either by a declaration that the marriage was valid or by a decree of nullity. Moreover, if one spouse asks for a decree of nullity, it should be open to the other spouse not merely to resist the making of the decree, but also to ask for a declaration that the marriage was valid.

23. On the other hand, we see no valid reason why a person should be able to obtain a declaration in rem as to the validity of his parents' or grandparents' marriage - or, indeed, of anyone else's marriage. We are here concerned only with declarations in rem; our proposal does not in any way impinge on declarations made in the Queen's Bench or Chancery Divisions or with judicial findings in personam made in the course of proceedings and for the purpose of those proceedings. For instance, the applicant who asks for a declaration that he is legitimate may need to establish that the marriage of his parents was valid; the court may hold that it is valid, but such a finding should, we think, be binding only on the parties to the legitimacy proceedings and should not operate in rem, binding everyone in the world. Similarly, if in an action to administer a deceased's estate the applicant was found to be the husband of X, that finding should (as is now the case) be binding only on the parties to that action. It is reasonable, and indeed necessary, that the court should be able to make a finding as to the validity of a marriage (whether it be the marriage of the applicant's parents or grandparents or of any other third parties) as a step in reaching its final decision in the applicant's proceedings, but the obtaining by an

applicant of a declaration in rem in respect of a marriage other than his own seems to us to be an unnecessary interference with third parties' rights. Our provisional proposal, upon which we invite comment, is, therefore, that a person should be able to apply for a declaration of the initial validity of his own marriage, but not of any other person's marriage.

(ii) Declaration that a marriage was initially void

24. It has been held[57] that the court has no power to make a declaration that a marriage was initially invalid but must, where it has found the marriage to be void, pronounce a decree of nullity.[58] The practical importance of the distinction between a declaration and a decree of nullity is that the court making a declaration has no power to make orders for maintenance (or any other financial provision) for a spouse or for custody and maintenance of children of the family, whereas the court pronouncing a decree of nullity can deal with these types of ancillary relief. We do not propose that these powers should be made available upon the making of a declaration;[59] therefore, if a spouse were able to obtain a declaration that his or her marriag was invalid as an alternative to a decree of nullity, he or she could thereby avoid being ordered to make financial provision for the other spouse or the children and the court would be deprived of its power to make proper provision for children's custody and control.[60] Further, a decree of nullity in respect of a void marriage is essentially a declaration of the initial invalidity of a marriage and it

57. Kassim v. Kassim [1962] P. 224; see fn. 24 above.
58. The position is not free from doubt, para. 13 above.
59. See paras. 55-56 below.
60. See Kassim v. Kassim [1962] P.224, 232.

seems to be unnecessary for there to be two varieties of relief which have basically the same purpose. In our view, it should now be made clear by statute that if there is jurisdiction to entertain nullity proceedings in respect of a marriage, the court should have no power to make a declaration in rem that the marriage was initially invalid.

25. There remains the question whether the court should be able to make a declaration of the initial invalidity of a marriage where there is no jurisdictional basis for making a decree of nullity. We have recommended[61] that the English court should have jurisdiction to annul a marriage where one of the spouses (a) is domiciled in England at the commencement of the proceedings, or (b) has been habitually resident in England throughout the period of one year ending with that date. It follows from these recommendations that the fact that a marriage was celebrated in England should no longer give the English courts jurisdiction in respect of a void marriage.[62] It might, however, be argued that if a marriage is celebrated in England, the English court should be able to make a declaration of its initial invalidity even if it has no jurisdiction to grant a decree of nullity. For instance parties who are not domiciled in England may come to England to be married and doubt as to the validity of the marriage may arise before either of them has habitually resided here for twelve months.

26. We would point out that if the celebration of the marriage in England is to give the English court jurisdiction to declare the marriage invalid, it should also give it jurisdiction to make a declaration of the validity of the marriage. However, we take the view that a declaration as to the validity or invalidity or a marriage operating in rem

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61. Report on Jurisdiction in Matrimonial Causes (Law Com. No. 48) para. 61.

62. Law Com. No. 48, para. 62.

should not be made unless one or other of the spouses has a sufficient connection with England;[63] the fact that the parties married here does not of itself satisfy this requirement. We would add the following comments. First, as regards formalities, while the English court may be expected to be more familiar with the formalities of its marriage laws, it is an exaggeration to suppose that a foreign court must have the assistance of an English court to determine a question of English law; in any event, cases involving formalities arise rarely in practice. Secondly, to allow this special basis of jurisdiction in declaration cases could lead to the evasion of the rules of jurisdiction in nullity proceedings; it would render it possible for a spouse to ask for a declaration at a time when neither spouse had resided in England for twelve months and thereby to avoid becoming subject to the powers with regard to financial provisions and children which would be available to the court in nullity proceedings.

27. Our provisional proposal on this point is that the court should not be empowered to make a declaration of invalidity of marriage in a case where there is no jurisdiction to entertain a petition for nullity of a void marriage.

(iii) Declarations as to the subsistence of a marriage whose initial validity is not in question

28. Once it is conceded that a marriage was initially valid, it can be terminated in only one of three ways: divorce, nullity or the death of a spouse. Therefore, an application to declare that such a marriage is a subsisting

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63. Para. 48 below.

marriage or that it is no longer subsisting is in effect an application to declare either -

(a) that the other party is alive or dead, as the case may be, or

(b) that a divorce or nullity is valid or invalid, as the case may be, in English law.

(a) death of a spouse

29. As far as the first category is concerned, we do not think that a declaration is necessary or appropriate for the determination whether the other party is alive or dead. Under the Matrimonial Causes Act 1965, section 14, a spouse can obtain a decree of presumption of death and dissolution of marriage if there is reason to believe the other party to be dead. The decree has the effect of a divorce and the court has power to make orders for custody and financial provision for children and, indeed, for financial provision for a spouse if the other party turned out to be alive.[64] Therefore, there is no need for an *in rem* declaration as to the death of the other spouse; such a declaration would have consequences far wider than those affecting the matrimonial relationship.

(b) validity of a divorce or nullity

30. So far as concerns the validity or invalidity of a divorce, since the English courts must recognise a decree of

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64. See *Manser* v. *Manser* [1940] P. 224 and *Deacock* v. *Deacock* [1958] P. 230, C.A., where the other party was found to be alive after a decree of presumption of death and dissolution of marriage.

divorce granted in Scotland, Northern Ireland, the Channel Islands or the Isle of Man,[65] no declaration is needed in such cases. In the case of a divorce obtained abroad - or, possibly, in the case of a decree of nullity granted in Scotland, Northern Ireland, the Channel Islands or the Isle of Man - doubt can and does arise as to whether such decree is valid in English law and it is appropriate that the court should have power to pronounce on its validity.

31. In effect, therefore, declarations as to the subsistence of a marriage need be obtained only in those cases where the validity of a foreign divorce or nullity is in question, and we propose that they be available only in such cases. Further, we think it would be sufficient if an applicant's right to obtain a declaration under this head were limited to declarations as to the validity in English law of a foreign divorce or nullity in respect of his own marriage and, for the same reasons as in the case of declarations as to validity of marriage,[66] should not extend to declarations as to validity of a foreign decree in respect of any other person's marriage. A right to obtain such a declaration as to the effect of a divorce or nullity, coupled with a right to obtain a declaration as to the initial validity of marriage, would, we think, cover every situation which has arisen in the decided cases and would meet the reasonable requirements of spouses who have a genuine doubt as to their matrimonial status.[67]

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65. Recognition of Divorces and Legal Separations Act 1971, s. 1; but the statute does not deal with the recognition in England and Wales of decrees of nullity granted in the other law districts of the British Isles.

66. See para. 23 above.

67. Our jurisdictional proposals, as to which see paras. 47-48 below, would have the effect of abolishing the ground of jurisdiction laid down in Lepre v. Lepre [1965] P. 52, namely, that where the determination of the validity of a foreign decree is a necessary step in proceeding to adjudication on a matter within the jurisdiction of the court, that of itself gives jurisdiction to make a declaration as to such validity.

At the same time this will set a reasonable limitation on the scope of declarations in rem.[68]

(iv) Declarations of legitimacy and legitimation

32. While the existing law allows a person to apply for a declaration of his own legitimacy, it does not enable him to ask for a declaration that any other person is legitimate.[69] By way of contrast, legitimation declarations are not so limited: an applicant can obtain a declaration that "he or his parent or any remoter ancestor" has become legitimated.[70] We have not been able to discover any convincing reason for this distinction and we invite views on (a) whether the scope of legitimacy declarations should be extended to ancestors or (b) whether both legitimacy and legitimation declarations should be limited to the applicant's own status. The argument in favour of the first approach is that declarations of legitimation or legitimacy of the applicant's ancestor could be useful to a person seeking to establish rights of succession in a foreign court if he has to prove that the deceased was legitimate or had been legitimated under English law and the foreign court decides that the applicant has no locus standi unless the English courts make a declaration of legitimacy or legitimation, as the case may be.[71] The case for limiting the scope of legitimation declarations to the applicant's own

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68. See paras. 37-38 below where we propose that declarations should operate in rem.

69. Matrimonial Causes Act 1965, s. 39(1); see paras. 7 and 12 above.

70. Ibid., s. 39(2); see para. 7 above.

71. If it is decided to extend the scope of legitimacy declarations to "remoter ancestors", the restriction to persons in strict line of ascent would need to be reconsidered; see Knowles v. A.-G. [1951] P. 54, fn. 4 above.

status is that declarations in rem should be restricted to cases where they are really needed. Foreign courts rarely require declarations as to status from English courts and the possibility that they may do so is not an adequate justification for giving an unnecessarily wide scope of declarations of legitimacy and legitimation. We would emphasise that the proposal that an applicant should only be able to obtain a declaration of his own legitimacy or legitimation is confined to applications for a declaration in rem; it would not prevent a finding as to the legitimacy or legitimation of persons other than the applicant where such a finding is necessary in the course of litigation.[72]

33. In any event, we would propose one extension to the court's power to make declarations of legitimation. The common law always recognised legitimation under the appropriate foreign law: this, in effect, meant recognition if, both at the time of the child's birth and at the time of the child's father's subsequent marriage to the child's mother, the law of the father's domicile recognised legitimation by subsequent marriage. But it may be that legitimation at common law also takes place where the appropriate foreign law recognises legitimation by parental recognition or by legislative or executive act.[73] To legitimation at common law the Legitimacy Act 1926 added legitimation by subsequent marriage where, irrespective of the father's domicile at the time of the child's birth, the father was, at the time of the subsequent marriage, domiciled either in England[74] or in another country by the law of which the child is legitimated by his parents'

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72. See para. 23 above where the same point is discussed with reference to declarations of validity of marriage.

73. See Dicey and Morris, The Conflict of Laws, 8th ed., pp.441-444 where such forms of legitimation are discussed.

74. Legitimacy Act 1926, s. 1.

subsequent marriage.[75] But having thus extended the scope of legitimation, the Act of 1926 confined applications for declarations of legitimation to cases falling within the Act, so that it is probably not possible to obtain under section 39 (which in effect re-enacts the relevant provisions of the Act of 1926) a declaration that the applicant has been legitimated at common law.[76] We propose that the law should specifically state that a person can obtain a declaration that he has become legitimated either under the Legitimacy Act 1926 or at common law.[77]

34. There remains the question whether it should be possible to obtain a declaration establishing the existence of the parent-child relationship in cases where the applicant does not claim the status of legitimacy or legitimation. It is, of course, already possible to obtain a decision of the court as to the parent-child relationship wherever that

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75. Ibid., s. 8.

76. It would be possible if, on the true construction of section 39(1), a person legitimated at common law can be said to be "the legitimate child of his parents."

77. We have considered whether it is desirable to provide for the making of a declaration that the applicant has been adopted under a foreign law. The question of recognition of foreign adoptions is not an easy one, as adoptions under some systems of law serve a different purpose from that envisaged by English law: see, e.g., Bedinger v. Graybill's Executor (1957) 302 S.W. 2d 594 where the Kentucky court upheld a husband's adoption of his wife in order that she might be enabled to succeed to property. We think that recognition of foreign adoptions should be left to be governed by the Adoption Act 1968 passed with a view to ratification of the Hague Convention of 15 November 1965 relating to the adoption of children. Adoption orders made in Scotland, Northern Ireland, the Channel Islands or the Isle of Man are recognised in England: Adoption Act 1964, s.1.

is an essential element in establishing a claim. But a decision obtained in that way binds only the parties. What we have in mind here is a declaration in rem. At one time the relationship of legitimacy or legitimation was all important. The illegitimate child had no legal rights in respect of his father. But now the position is different: the Family Law Reform Act 1969[78] goes a considerable way towards removing the disabilities of illegitimacy from the law. At present what appears to be increasingly important for legal purposes is not whether a person is the legitimate child of another but whether he is the child (legitimate or illegitimate) of that person. This suggests that what is needed today is a right for an illegitimate child to be able to apply for a declaration that someone is his father. If no steps can be taken until the father dies and the child claims against his estate, the evidence will be stale. On the other hand, there is much force in the argument that if anyone could apply for a declaration that he was another person's child this could be used for blackmailing purposes. Since an alternative remedy[79] is available it might be thought undesirable to introduce a new type

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78. Since the coming into operation of Part II of the Act, illegitimate children are for succession purposes almost in the same position as legitimate children. Illegitimate children are given succession rights against either of their parents who dies intestate equal to those of legitimate children. References to 'children' in dispositions made after 1 January 1970 are to be construed as including illegitimate children unless a contrary intention is shown in the disposition. Further, illegitimate children are treated as dependants for the purposes of family provision legislation.

79. The question of paternity can be determined as and when a dispute arises in which the point is relevant, e.g. when a person makes a claim against the alleged father's personal representatives.

of declaration in rem which could lend itself to such purposes. We make no proposal on this point, but invite views.

(v) Declarations concerned with British Nationality

35. Section 39(4) provides that any person who is domiciled in England or Northern Ireland or claims any real or personal estate situate in England may apply for a decree declaring his right to be deemed a British subject. It is not clear why the issue of nationality was assigned by the Legitimacy Declaration Act 1858 to the Divorce Court, unless it was that nationality frequently depends on legitimacy or on the validity of a marriage and it was thought convenient to empower the same court to try the related issues together.[80] Be that as it may, we can trace only one reported case[81] of an application for declaration of British nationality being decided during this century under section 39 and we are informed by the Principal Registry that none of the present staff recollects any such application being made.[82] Such applications have, in practice, been made in the Chancery or Queen's Bench Division under Order 15, rule 16.[83]

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80. The Legitimacy Declaration Act 1858, s. 2 provided that "where such application [to be deemed a natural-born subject of Her Majesty] is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition."

81. Abraham v. A.-G. [1934] P. 17.

82. Since this paper was prepared we are informed that an application has in fact been made.

83. The leading case in the post-war years, A.-G. v. Prince Ernest Augustus of Hanover [1957] A.C. 436, was brought in the Chancery Division. It seems that the right to apply under the Order is not excluded by the statutory remedy under s. 39 because that merely affords an additional, and not an exclusive, remedy for establishing an independent right: cf. Pyx Granite Co. Ltd., v. Ministry of Housing and Local Govt. [1960] A.C.260.

36. We have considered, in the circumstances, whether there is any need to retain a statutory right to apply in the Family Division for a declaration of British nationality. There is no evidence of any such need and, as the application can be made in any division of the High Court under the Court's inherent jurisdiction, we think that there is no need for any statutory provision. We, therefore, propose that the existing statutory provision be repealed.

(2) Should declarations operate in rem or should their binding effect be limited to the parties to the proceedings?

37. As we have seen, declarations under Order 15, rule 16, operate in rem, i.e. are universally binding, whereas declarations under section 39 are stated to be binding on all persons, provided that such declarations are not to "predudice" any person unless that person had notice of the application (or claims through a person who had such notice) or where the declaration itself was obtained by "fraud or collusion".[84] There appears to be no reported case - and we have never heard of one - where the proviso was invoked by anyone alleging to be "prejudiced" by the declaration. In view of the procedural safeguards laid down by section 39 it is unlikely that an interested party would fail to receive notice of the proceedings. As for "fraud or collusion",[85] the possibility of this exists in the case of all proceedings and we see no reason why declaratory decrees under section 39 should be singled out for special treatment; in other proceedings for declaring or altering matrimonial or family status the existence of fraud is a ground for rescission of the decree, but a decree which remains in force notwithstanding fraud operates in rem without limitation in respect of

84. See para. 9 above.

85. Collusion appears to be used in s. 39 in the sense of fraud.

persons prejudiced by the decree; thus a decree of nullity or divorce, although obtained by fraud, is, unless and until rescinded, binding on all persons including anyone prejudiced by it. We think, therefore, that declarations, whether of the kind falling within section 39 or otherwise, should operate in rem in the fullest sense without limitation in respect of any class of persons, as is already the case with declarations under Order 15, rule 16; procedural safeguards and jurisdictional criteria (matters with which we deal later[86]) should be framed with that in view.

38. We say this for the following reasons -

(1) Unless the declaration is in rem it largely fails in its purpose; one might as well deny the possibility of obtaining a declaration and allow the question to be determined, if and when it is relevant, in an action in personam[87]. The purpose of a declaration regarding status is to still doubts once and for all.

(2) A decree of divorce or nullity operates in rem and it would be anomalous and inconvenient if a distinction were drawn between two types of decree both of which determine the status of a marriage. If a decree that a marriage was void operates in rem, so, surely, should a decree that it was valid.

It follows, therefore, that in our view the existing limitations on the universally binding effect of a declaration

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86. Paras. 50-51 below.

87. e.g. in a claim against a deceased's estate.

under section 39[88] should disappear and the effect of all declarations in family matters should be similar to the effect of decrees of nullity of a void marriage.[89] If, despite safeguards, a declaration is made which should not have been made, persons affected should have the same remedy by way of appeal as they have in the case of a decree of nullity or divorce.

(3) Should declarations be in the discretion of the court or should they be obtainable as of right?

39. The making of declarations under Order 15, rule 16, is a matter within the discretion of the court.[90] Declarations under section 39 appear to be obtainable as of right. There is a strong case in favour of applying the same principle to all types of declarations in family matters and for providing that they should be available as of right, as is nullity. The contrary arguments are that the courts, if they have a discretion, can use it to impose safeguards for the protection of third parties; and that courts exercise their discretion not capriciously but judicially.[91] In

88. See para. 9 above; the limitations are to the effect that the declaration, while universally binding, is not to prejudice any person (1) if obtained by fraud or collusion, or (2) unless that person has been given notice of, or was a party to, the proceedings or claims through such a person: section 39 (5).

89. The decree of nullity of a void marriage is, in fact, a declaration that there is not and never was a marriage.

90. See para. 15 and fn. 47 above.

91. ".....[I]t is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration. 'In my opinion', said Lord Sterndale M.R. in Hanson v. Radcliffe U.D.C. [1922] 2 Ch. 490, 507, 'under [Order 15, rule 16] the power of the to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.'": Ibeneweka v. Egbuna [1964] 1 W.L.R. 219, 225, per Viscount Radcliffe giving the judgment of the Privy Council.

practice it seldom matters whether a remedy is obtainable as of right or in the discretion of the court. We provisionally propose that declarations of marital status and legitimacy should be available as of right, not because there is any likelihood that the court, given a discretion, would exercise it against a bona fide applicant but because the right to determine one's matrimonial status or one's legitimacy is likely to be regarded as a human right that should not be subject to the court's discretion. We invite views.

(4) What should be the position on the dismissal of an application?

40. In Starkowski v. A.-G.,[92] on dismissing an application for a declaration that the marriage of the applicant's parents was valid and that the applicant had become legitimated, the court appears to have made a negative declaration: namely, that the marriage was invalid and that the applicant had not become legitimated. Such a negative declaration was expressly refused in B. v. A.-G.[93] The question arises whether the court should have power to make a negative declaration on the dismissal of an application for the substantive declaration. We suggest that the better view is that the court should not grant a declaration (which operates in rem) for which no one has asked. Again, it is undesirable that, on dismissing an application for a declaration of validity of marriage, the court should declare the marriage to be void; in doing so the court would, in effect, be granting a decree of nullity without giving the parties an opportunity to apply for financial provision and without observing the safeguards for children which arise on a decree of nullity being made.

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92. [1952] P. 135; [1952] P. 302, C.A.; [1954] A.C. 155, H.L; see fn. 13 above.

93. [1967] 1 W.L.R. 776.

41. If our procedural proposals[94] are adopted so that all interested parties are before the court or have notice of the proceedings, the court could, in a suitable case, afford the parties, if they so wished, assistance - by abridging time-limits, dispensing with service, etc. - to enable a decree of nullity to be made without delay. We suggest that it would be undesirable for the court to make a specific declaration of status unless expressly asked to do so in proceedings appropriate to the nature of the relief sought.

(5) Should persons other than a party to the marriage be entitled to apply for a declaration as to the marriage?

42. In paragraph 23 we have given our reasons for answering this question in the negative.

(6) Should an application to determine the validity of a marriage be available after the death of a spouse?

43. Under existing law a person can apply after the death of his or her spouse either for a declaration under section 39 that his marriage was valid ab initio or for a decree of nullity which is, in effect, a declaration that it was void ab initio.[95] He can also ask, after his spouse's death, for a declaration under Order 15, rule 16, that his foreign divorce was invalid in English law[96] and, presumably, for other declarations in respect of his marriage. The question arises whether a spouse, whose marriage cannot in

94. See paras. 50-51 below.

95. A voidable marriage cannot be annulled after the death of one of the parties.

96. Re Meyer [1971] P. 298.

any event be in being by reason of the other spouse's death, should be able to obtain a determination operating in rem concerning the validity of that marriage, whether by way of a declaration that the marriage was initially valid, by way of decree that the marriage was void, or by way of a declaration of the validity of a foreign decree of divorce or nullity.

44. We suggest, for the reasons set out in this paragraph, that the present rule should be retained, though we are aware that a case does exist for the view that neither nullity nor a declaration as to validity should be available after the death of a spouse. Our reasons are:

(1) An existing right should not be taken away unless it is shown to work a mischief, or at least that it is undesirable.

(2) The right of a spouse to apply after the death of the other spouse for a decree of nullity declaring his marriage to have been void has existed for centuries; the like right of a spouse to apply for a declaration that his marriage was valid has existed since the Legitimacy Declaration Act 1858. There is nothing to suggest that the exercise of these rights has caused harm or has been abused.

(3) The circumstances of Aldrich v. Attorney-General[97] and Re Meyer[98] show that the obtaining of a declaration as to status of the former marriage can serve a useful purpose. Such a declaration can prove useful to a person such as Mr Aldrich who is seeking to establish rights of succession in a foreign country and the foreign authorities indicate that they would be assisted by a declaration from the English court. Even if no financial advantage flowed from the declaration there is no good reason for depriving a woman in Mrs. Meyer's position of the chance of obtaining, if she so desires, a declaration in rem that she is her husband's widow and not his divorced wife.

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97. [1968] P. 281 (a woman had died leaving a large estate in Switzerland, whose law gave extensive rights to her parents. The petitioner claimed that the deceased was his legitimate daughter and sought declarations that (a) he had been validly married to her mother, who had died before the petition, and (b) that he was her father. Ormrod J. granted a declaration under s. 39, Matrimonial Causes Act 1965 that the petitioner's marriage was initially valid but held that he had no jurisdiction to make a declaration of legitimacy of a person other than the petitioner).

98. [1971] P. 298 (the wife divorced the husband in Nazi Germany under duress; both parties lived together in England for some years: on the husband's death his widow became entitled in Germany to a pension from a Compensation Fund for the benefit of victims of the Nazi regime; the wife applied for a declaration that the divorce decree was void, the German court intimating that it would accept the English court's decision as to the validity of the German divorce).

45. The arguments for abolishing the present rule may be stated thus:-

(1) In proceedings in which the status of the former marriage is relevant the court will continue to be able to make declarations as to the validity of that marriage and to make findings on questions bearing on its validity. Although such declarations and findings would operate *in personam*, that is all that is needed; there is no need for an *in rem* determination as to the status of a marriage, which cannot in any event be in existence because one of the parties is dead.

(2) The fact that *Aldrich* v. *Attorney- General*[99] and *Re Meyer*[100] appear to be the only reported decisions in which applications for an *in rem* declaration were made after the death of a party to the marriage demonstrates the lack of need for such a remedy. In *Aldrich* v. *Attorney-General* the petitioner should have taken the appropriate proceedings in the Swiss court to establish his claim to assets which lay within the jurisdiction of that court. *Re Meyer* is a case which is unlikely to arise very frequently since in most cases foreign courts are not inhibited from deciding the sort of questions that arose in that case.

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99. See fn. 97 above.
100. See fn. 98 above.

46. The arguments for and against the present rule are evenly balanced. Though an unusual case, Re Meyer did reveal facts in which the rule enabled justice to be done. We therefore recommend its retention.

(7) Jurisdiction

47. Under the existing law jurisdictional requirements for obtaining declarations vary according to the type of declaration claimed.[101] This variation is partly the result of statutory provisions going back to 1858[102] and partly due to judicial attempts to determine the proper jurisdiction for applications under Order 15, rule 16. We think that some uniform principle should be introduced so that there is a clear, logical and satisfactory basis for the exercise of jurisdiction.

(a) Validity of marriage or of foreign divorce or nullity

48. We take these two categories of declaration together. As in the case of a decree of nullity of a void marriage, they determine a matrimonial status and it would be logical to provide that jurisdiction to make such declarations and jurisdiction to make a decree of nullity should depend on the same circumstances. This would mean that the court would have jurisdiction to make declarations of validity of marriage if, at the commencement of proceedings, either the petitioner or the respondent were domiciled[103] in England or had been resident in England throughout one year ending with that date.[104] This proposa

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101. See paras. 7, 14 and 16(3) above.

102. The Legitimacy Declaration Act 1858.

103. A married woman or a married minor being allowed to have an independent domicile for this purpose.

104. See our Report on Jurisdiction in Matrimonial Causes (Law Com. No. 48), paras. 59, 61, which proposes for nullity the same jurisdictional criteria as for divorce: ibid., para. 47.

has these advantages -

(i) it will ensure that a declaration operating in rem will not be made unless one or other of the spouses has a sufficient connection with England; and

(ii) since that connection will be the same as in the case of proceedings for nullity or divorce, if one spouse seeks a declaration in respect of the marriage, the other spouse would be able to cross-petition for divorce or nullity.

(b) Legitimacy and Legitimation

49. As we have seen,[105] the jurisdictional criteria in respect of a declaration of legitimacy are very strict while those in respect of a declaration of legitimation are non-existent. We think that the jurisdictional criteria should be the same in both cases. These declarations differ from those in respect of the marriage in two respects: first, the declaration does not relate directly to the marriage and, secondly, there seems to be no obvious reason why the domiciliary or residential connection of the respondent[106] (as opposed to the applicant) should of itself confer jurisdiction on the English court. These differences lead us to

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105. Para. 16(3) above.

106. Under our proposals the parents, if alive, would be respondents, but in some circumstances the Attorney-General and other interested persons could be respondents: see Appendix.

suggest that the jurisdictional connection should be solely that of the applicant and, since the result of the application is to determine his status, the connection should be the same (as regards the applicant's connection) as in the case of a declaration in respect of his marriage, i.e. domicile in England at the date of the application or habitual residence throughout the period of one year ending with that date.

(8) Procedural safeguards

(a) Procedural safeguards in proceedings for declarations

50. Under the existing law there is a contrast between the section 39 procedure and that under Order 15, rule 16. Section 39 specifies certain requirements which, if not met invalidate or severely limit the effect of the declaration, while the Order leaves the protection of third parties and the public to the court's discretionary powers.

51. Since we are proposing that declarations should operate in rem, safeguards are necessary if the interests of third parties and the public are to be protected. Clearly, in proceedings concerned with matrimonial status the other party to the marriage should be made a respondent and in proceedings concerned with legitimacy the applicant's parents (if alive) should be respondents. The real problem is how to ensure the protection of others interested and the public. The court already has discretionary powers to order steps to be taken to protect third parties, and these operate satisfactorily.[107] But it may be thought that safeguards are so important that specific provision should be

107. Kunstler v. Kunstler [1969] 1 W.L.R. 1506 is an example of this discretion: see para. 15 above.

made. Provisionally, this is our view. On this matter we have consulted the Treasury Solicitor; the Appendix[108] sets out proposals to which he assents. At a later stage a decision will have to be taken as to whether such safeguards, if acceptable, should be enacted in the statute itself or by rules of court.

(b) Procedural safeguards in nullity

52. We have already mentioned the close relationship between a declaration of the initial validity of a marriage and a decree of nullity of a void marriage. One is the converse of the other and both canvass the same issues. Though in one the applicant seeks to show that there was a valid marriage and in the other the applicant seeks to show that the marriage was void, the declaration or decree, if obtained, is binding in rem. There is, therefore, a prima facie case for suggesting that the safeguards we propose when the application is for a declaration of validity, should extend to the case where the application is for a decree of nullity. It seems to us that it would be anomalous if, on a application for a declaration that a marriage is valid, the petitioner should be required to give particulars of every person whose interests may be affected and afford them an opportunity of becoming parties, but that there should continue not to be any such rule in the case of a petition for nullity on the ground that the marriage was void. In Kunstler v. Kunstler,[109] for example, had the husband wished to establish that the first marriage continued and had he alleged that his divorce from his first wife was invalid, he could have petitioned for nullity of his second marriage

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108. Page 60 below.

109. [1969] 1 W.L.R. 1506; the facts of that case are set out in fn. 45 above.

on the ground that he was married at the time when it was contracted; in that event, the first wife would not have been notified of the proceedings - although vitally affected. Similarly, if the husband had alleged that his first marriage was void, he could have petitioned for nullity of his first marriage and in that event his second wife would not have been notified of the proceedings - although vitally affected.

53. It seems impossible to justify a provision requiring certain safeguards to be taken where it is sought to declare that the marriage was valid, but not requiring any such safeguards where it is sought to declare that the marriage was void. We accordingly suggest that the procedure proposed in the Appendix should apply not only to petitions for declarations but also to petitions for nullity of a void marriage. The numbers of petitions for nullity of a void marriage in the three years 1969-1971 were 98, 95 and 76 respectively. The Treasury Solicitor has been consulted and has said that he would be able to act in these cases on the same basis as in the case of applications for a declaration.[110]

54. It may be asked whether, if these procedural safeguards are needed in the case of declarations and of nullity of a void marriage, they are not equally needed in the case of suits for nullity of a voidable marriage or for divorce or for judicial separation. Suits for nullity of a voidable marriage, divorce or judicial separation are essentially the private concern of the two spouses.[111] The petitioner is

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110. We do not propose that the Attorney-General should be involved beyond the substantial relief claimed, e.g., he would not be concerned with ancillary relief or the children which would remain the responsibility of the parties and the court.

111. Since the Divorce Reform Act 1969 the spouses can by consent obtain a divorce or judicial separation after two years' separation: ibid., s. 2(1)(d).

free to decide whether or not to bring the suit and whether to call evidence which would bring the marriage to an end; the respondent is free to decide whether or not to oppose the suit. The object of the suit is to bring about a change of status by establishing certain facts and the success or failure of the suit is not the concern of any one else, except in the limited sense that third parties (including the Queen's Proctor) can intervene in order to show that material facts have not been brought before the court.[112] On the other hand, a declaration - whether it takes the form of a decree of nullity of a void marriage or declares that a marriage is valid or that a foreign decree is recognised or that the applicant is legitimate - is a determination of an existing state of affairs which affects interested third parties as well as the spouses themselves. The purpose of the proceedings is not to alter the existing state of affairs - a matter which is dependent on the wishes of one or other or both spouses - but to establish what it is - a matter which is independent of the spouses' wishes. For these reasons we are of the opinion that further safeguards are not necessary in suits other than suits for nullity of a void marriage.

(9) Should ancillary relief (i.e. financial provision for spouse and children) be available on the making of a declaration?

55. Under existing law it is not possible for the court to make financial provision for a spouse or children if the only relief obtained is a declaration: but, if a decree of nullity be granted, the whole range of the court's powers to make such provisions is available. We believe that no change in the law is needed.

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112. Matrimonial Causes Act 1965, s. 7. In addition, the court can give a person leave to intervene if it considers "in the interest of any person not already a party to the suit, that that person should be made a party to the suit," (ibid., s. 44) and can ask the Queen's Proctor to argue any matter (ibid., s. 6(1)).

56. The question arises only in connection with declarations as to matrimonial status. If a declaration of validity of marriage is made, the applicant has all the rights of a spouse under the general law. If an applicant seeks to invalidate a marriage, his proper course is to ask for a decree of nullity, in which event the court has all its powers. If, however, an applicant seeks a declaration of the validity of a foreign decree of nullity or divorce, a difficult question arises. In such a case the law has so far proceeded upon the basis that the applicant must be content with whatever rights he has in the foreign tribunal so that there is no requirement for the English court to possess any powers to make financial provisions for spouse or children. If there is to be conferred upon the English court such powers, the whole problem of maintenance awards made here where a decree of divorce or nullity has been made abroad will have to be examined. The present limited context is not the appropriate place for such a wide-ranging inquiry; accordingly we make no recommendation for a change in the law.

(10) What court should hear the application?

57. With one exception the Family Division of the High Court has exclusive jurisdiction to hear applications for declarations as to matrimonial or family status,[113] both under section 39 and under Order 15, rule 16. The exception is that an application for a declaration of legitimation[114] can be brought either in the Family Division of the High Court[115]

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113. Administration of Justice Act 1970, s. 1 (2) and Sch. S.I. 1971/1244; Practice Direction [1971] 1 W.L.R. 22

114. i.e. that a person has become legitimated as opposed being legitimate from birth.

115. Section 39(2). In the three years 1969-1971 the numbers of applications under section 39 made in the High Court were 1, 5 and 6 respectively and in the county courts 27, 14 and 22 respectively.

in the county court, subject to a power of transfer to the Family Division where owing to the value of the property involved or some other reason the case is one which ought to be tried in the High Court.[116] There is no logical reason why an applicant claiming to be legitimate must apply in the Family Division; whereas if he is claiming to be legitimated he may apply either in that Division or in a county court. We think that both types of declaration should be available in the same court.

58. Until the Matrimonial Causes Act 1967 matrimonial causes could be tried only in the High Court and, in view of this exclusive jurisdiction in divorce, nullity and judicial separation, it was to be expected that declarations of matrimonial status would be assigned to the High Court; this was the case with the one exception of the declaration of legitimation.[117] The Matrimonial Causes Act 1967[118] assigns the trial of undefended matrimonial causes to divorce county courts, with the result that today almost all matrimonial matters are tried there unless they become defended. Applications for declarations, whether under section 39 or under Order 15, rule 16, must, however, be instituted and

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116. Section 39(3); see para. 9 above.

117. Declarations of legitimation were introduced into English law by the Legitimacy Act 1926 and section 2 of that Act gave the county court jurisdiction in respect of such declarations.

118. S. 1(3); matrimonial cause in this context means a suit for divorce, nullity, judicial separation, restitution of conjugal rights or for damages only and includes an application for leave to present a petition for divorce within three years of marriage: Matrimonial Causes Act 1967, s. 10(1): Supreme Court of Judicature (Consolidation) Act 1925, s. 225. (Suits for restitution of conjugal rights and for damages are now abolished).

tried in the Family Division with the one exception of an application for legitimation. It seems anomalous that a judgment that there is no marriage, i.e. a decree of nullity, may be pronounced in the county court, but that a judgment that there is a marriage - either because it was initially valid or because e.g. a foreign decree of divorce is invalid - must be pronounced in the Family Division and we think that there should be uniformity in this respect. We therefore propose that all applications for declarations which can be made in family matters should be commenced in a divorce county court and should be transferable to the Family Division in the same circumstances as in the case of nullity, divorce and other matrimonial cause

(11) Certain consequential changes in the law as to nullity of a void marriage

59. We have already indicated our provisional view[119] that in proceedings for a declaration of validity of marria only a party to the marriage should be able to apply. In t case of a petition for nullity of a void marriage, in addition to the spouses themselves, any person with a sufficien interest in obtaining a declaration of nullity may petiitio A slight pecuniary interest is sufficient[120] and anyone whose title to property would be affected or on whom a lega liability might be cast by the natural result of the marria

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119. See paras. 23 and 42 above.

120. Faremouth v. Watson (1811) 1 Phillim. 355 (a sister having a contingent interest under a will if her brother died without issue was held to have a sufficient interest to have her brother's marriage annulle

(i.e. the birth of issue) has a right to ask for a decree of nullity.[121]

60. What is the reason for this rule of law? It appears to derive its origin from the adoption by ecclesiastical courts of the civil law rule that the plaintiff could not be heard unless he had an interest in the result of the suit.[122] By the 18th century this principle was firmly established and the only outstanding doubt was as to the nature of the interest which a person petitioning for the annulment of someone else's marriage had to have.[123] In 1837 the Privy Council finally decided that the interest had to be "pecuniary",[124] overruling the view of the Court of Arches that a father's "moral" interest in his child's welfare was sufficient.[125]

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121. Sherwood v. Ray (1837) 1 Moo. P.C.C. 353 at 399, 400 (a father was allowed to petition for the annulment of his daughter's marriage since he had a sufficient financial interest to enable him to do so owing to his potential liability under s. 7 of the Poor Relief Act 1601 to maintain his pauper grandchildren). A mother could not petition to have her child's marriage annulled during the lifetime of the father since her liability under the Act of 1601 did not arise until after the father's death: Bevan v. M'Mahon (1859) 2 Sw. & Tr. 58.

122. See the historical review of the law in counsel's argument in Sherwood v. Ray (1837) 1 Moo. P.C.C. 353 at 369-370.

123. See Ray v. Sherwood (1836) 1 Curt. 173, 184 per Dr. Lushington: "With respect to a civil suit, it is admitted on all hands that to enable any person to institute a suit in the civil form, the individual seeking to commence the suit must make out an interest of some kind or other; the difficulty appears to be to determine what that interest should be."

124. Sherwood v. Ray (1837) 1 Moo. P.C.C. 353.

125. Ray v. Sherwood (1836) 1 Curt. 193, 227.

61. The history of the matter demonstrates that where a third party has a sufficient interest in impugning the validity of a marriage, he should be entitled to do so; this principle should, we think, be preserved but we take the view that any decision on such proceedings should not have a binding effect in rem. We have already indicated[126] our general view that only parties to the marriage should be able to apply for a declaration in rem as to the validity of their marriage and our examination of the law of nullity in this context leads us to propose that a decree of nullity of a void marriage[127] should be available only on the application of a party to the marriage.

62. If this proposal is accepted, an interested person will remain entitled to impeach the marriage in proceedings concerning his interest, e.g. the administration of a

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126. Para. 23 above.

127. In the case of a voidable marriage on the ground of impotence, no one other than one of the spouses can petition: see e.g. A. v. B. (1868) L.R. 1 P. & D. 559. We think that the same rule applies today in the case of other grounds of voidability and this is supported by obiter dicta in Ross Smith v. Ross Smith [1963] A.C. 280 at 306, 348; the limitations in Nullity of Marriage Act 1971, s. 3, namely that the petitioner's conduct and injustice to the respondent may be a bar to relief when the marriage is voidable, and the further requirement in the case of two of the grounds that the petitioner was ignorant of the defect at the time of marriage, also support this view. Nevertheless, we propose that any legislation abolishing the right of third parties to petition for a decree of nullity of a void marriage should extend to voidable marriages, thereby removing any doubt tha there may be in the light of the Privy Council's decision in Sherwood v. Ray (1837) 1 Moo. P.C.C. 353 which allowed an interested person to petition for nullity of a voidable marriage (on a ground other tha impotence) during the lifetime of both spouses: see Rayden on Divorce, 11th ed., p. 110.

settlement in which he has an interest, but any decision as to the validity of the marriage will be binding on the parties to the proceedings only and will not operate in rem. We are informed by the Principal Registry of the Family Division that no one there can recollect a case of nullity brought by a person other than one of the spouses. The short report of Re Spier,[128] a probate action, says that the testator's marriage was declared null and void, but it is probable, since there was no petition for nullity, that the declaration was not a decree of nullity but one made in the probate action and, therefore, binding only on the parties to that action. Subject to this, the last reported case of nullity on the petition of a person other than one of the spouses appears to be Wells v. Cottam in 1863.[129]

128. [1947] W.N. 46.

129. (1863) 3 Sw. & Tr. 364; in J. v. J. [1953] P. 186 the wife's niece attempted to petition as the wife's next friend and not in her own right.

IV. JACTITATION OF MARRIAGE

63. In Working Paper No. 34 on Jactitation of Marriage we examined this remedy and reached the provisional conclusion that it should be abolished. We stressed the fact that this conclusion was provisional only and we asked for comments and views. The majority of the comments we received advocated abolition of the remedy, but there were also a number of commentators who were anxious to see it retained or, at all events, not abolished unless an alternative remedy was provided to take its place. The gravamen of their arguments was that there were, albeit rarely, cases in which a person found himself or herself in an intolerable situation because someone falsely claimed to be married to him or her and was giving publicity to the false claim, but since the claim did not of itself necessarily amount to defamation, it could not be silenced except through the medium of a jactitation suit. It was also pointed out that the threat of instituting jactitation proceedings was, in the commentators' actual experience, at times sufficient to put an end to such false claims. In these circumstances, we think that if the suit is to be abolished it should only be done after a general review of civil remedies available in respect of injurious statements. In the meantime, since the jactitation decree takes the form of a declaration that the respondent is not married to the petitioner, we propose to examine the jactitation suit in the context of declarations.

64. A petition for jactitation of marriage is an application for a declaration that the parties are not married, coupled with a prayer for an injunction to stop the respondent from claiming that he is married to the petitioner. The declaration that the parties are not married does not

bind third parties[130] and is not, therefore, in any sense equivalent to a decree of nullity.[131] The practical value of the declaration consists, therefore, of it being a preliminary step leading to the real substance of the remedy sought: namely, the injunction to silence the respondent's false claim. Unless, therefore, the effect of a jactitation decree were made substantially different, the replacement of the declaration in the jactitation decree by a declaration of the kind we have been discussing in this Paper would require special provisions: first, a provision that the declaration is not to operate in rem; secondly, that it is not to be conclusive even as between the parties in the event of new evidence being subsequently adduced to establish that the parties were in fact married; thirdly, unless one wanted to change the nature of the jactitation suit, special provision would need to be made allowing the respondent to plead defences available to him in such a suit but inappropriate to an application for a declaration.[132] In our view the declaration in a jactitation decree must be treated as sui generis and should remain an integral part of a jactitation suit.

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130. Duchess of Kingston's Case (1776) 20 State Tr. 355; it seems that it is not even conclusive as between the parties, but that the case can be reopened on the respondent showing on new evidence that the parties were married: ibid., at 534, 544, 545.

131. Duchess of Kingston's Case, supra: see Working Paper No. 34 para. 6.

132. For instance, in a jactitation suit the respondent can, by way of defence, deny that he had claimed to be married to the petitioner, but such a defence is irrelevant to an application for a declaration; another defence open to the respondent is that the petitioner had acquiesced in the misrepresentation, which is again irrelevant to an application for a declaration.

65. There is, however, one respect in which we think a jactitation suit should undergo a change without delay. If the respondent in answer to the suit claims that there is a valid marriage between him and the petitioner and the court so finds, the court can make a declaration that the parties are validly married which declaration operates in rem.[133] We see no objection to the court making this declaration, and it may be convenient to all concerned that it should do so, particularly if there is genuine doubt as to whether the parties are married or not; but we think that such a declaration (just like other declarations as to matrimonial status) should be made only if the jurisdictional criteria to make such a declaration exist and if the procedural safeguards which we have proposed had been observed. Therefore, we propose that the court, on dismissal of a jactitation suit, should not have power in those proceedings to declare the marriage valid unless the respondent himself makes an application (subject to the jurisdictional and procedural requirements applicable to such an application). This application should, where appropriate, be consolidated with the jactitation suit.

66. Finally, we have to consider jurisdiction in jactitation of marriage. The existing jurisdiction is uncertain. Some textbooks suggest that the jurisdiction is the same as the nullity,[134] but this seems doubtful if only because the Matrimonial Causes Act 1965, s. 40, which lays down two grounds of jurisdiction in proceedings for nullity

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133. Poynter, Ecclesiastical Court (1824), p. 271; Goldstone v. Smith (1922) 38 T.L.R. 403.

134. Rayden, Divorce, 11th ed., p. 77, para. 39: this view is based on the argument that "in suits for jactitation the main question to be tried is generally the validity of the marriage": ibid.; Dicey & Morris, The Conflict of Laws, 8th ed., p. 344, fn. 58.

is in terms not applicable to proceedings for jactitation of marriage. Other textbooks state that the jurisdiction in jactitation exists if both parties are resident in England.[135] Whatever may be the true basis of jurisdiction in jactitation, our view is that this jurisdiction should be the same as in tort.[136] The suit is in effect an action in tort but for historical reasons and because of its special nature it is tried in the Family Division.[137] We think that the suit should continue to be tried in this Division, first, because relief generally depends on a determination as to the validity of a marriage and, secondly, because the respondent to the jactitation suit may want to ask the court for a declaration that the marriage in question is valid.

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135. Latey, Divorce, 14th ed., p. 216; Halsbury, Laws of England, 3rd ed., Vol. 7, p. 110, para. 196; this view is based on the argument that jurisdiction in jactitation is founded, as it was in the ecclesiastical courts, on the residence of both parties: ibid.; the residence of the respondent alone was, however, sufficient to give the ecclesiastical courts jurisdiction: Garthwaite v. Garthwaite [1964] P. 356, 389-390, C.A.; Sinclair v. Sinclair [1968] P. 189, 199, 213, 223, C.A.

136. See Morris, The Conflict of Laws, (1971) Ch. 13.

137. Compare the former suit by a husband for damages against an adulterer (the suit was abolished by the Law Reform (Miscellaneous Provisions) Act 1970, s. 4) which was treated as an action in tort and jurisdiction to hear the suit was the same as jurisdiction in tort: Jacobs v. Jacobs and Ceen [1950] P. 146.

V. THE GREEK MARRIAGES ACT 1884

67. Between 1836 and 1857 marriages between members of the Greek Orthodox Church were celebrated in England in religious form in the belief by all concerned that they were valid in English Law. In fact they were not valid as they failed to comply with legal requirements or, at best, there was doubt as to their validity. Consequently the Greek Marriages Act 1884 was passed, its object being "to remove doubts as to the validity of certain marriages of members of the Greek Church in England."[138] Unfortunately, the Act as drafted was ineffective to remove those doubts, for instead of validating the doubtful marriages in question (as was done in numerous other Acts which validated doubtful or invalid marriages), the Act left the marriages invalid unless an interested party applied for declaration of validity with regard to any particular marriage.

68. Two such applications are reported,[139] but neither the Greek Orthodox authorities in England nor the Principal Registry[140] have any record to show whether any other applications have or have not been made. The total number of marriages to which the Act applies is 36, so that it is the fate of 34 marriages which is unknown. In theory the Act can be invoked at any time in the future, since the application for a declaration can be made by one of the parties to the marriage, by their children or grandchildren or by "any person interested in the validity of any such marriage."[141]

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138. 47 and 48 Vict., c. 20.

139. Zarafi v. A.-G. (1885) 1 T.L.R. 683; Scaramanga v. A.-G. (1889) 14 P.D. 83.

140. We are informed by the Principal Registry that none of their officials can recollect any application under the Act being made in the last 25 years.

141. Act of 1884, s. 1.

Grandchildren of persons married between 1836 and 1857 may well be alive today and a person may be "interested", e.g. for succession purposes, in obtaining a declaration of validity of marriage at any time within the reasonably foreseeable future. Though this is the theoretical position, it is doubtful whether in practice any further applications for a declaration are to be expected and the Act can probably be regarded as being, in practice, of no further utility.

69. There is in our view little point and, indeed, a positive disadvantage in keeping on the Statute Book an Act which is, for practical purposes, spent and we propose that the Act should now be repealed and, in order not to prejudice any person interested, the remaining 34 marriages (or so many of them as have not already been validated under the Act) should, subject to the limitations set out in the proviso to section 1 and in section 2 of the 1884 Act,[142] be now declared by statute to have been valid. We have communicated this proposal to the Greek Orthodox Archbishop of Thyateira and Great Britain, as Head of the Greek Orthodox community here, and he approves of it.

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142. Section 1: "Provided always, that this Act shall not extend to render valid any marriage which before the passing thereof has been declared invalid by any court of competent jurisdiction in any proceedings touching such marriage, or any right dependent on the validity or invalidity thereof, or any marriage where either of the parties thereto has afterwards during the life of the other intermarried with any other person".

Section 2: "Provided always, and be it further enacted, that the status of any person or any right of any person to any real or personal property or any estate or interest of any such person in any real or personal property which may be dependent on the invalidity of any such marriage shall not be altered, taken away, or injuriously affected by any decree made under the provisions of this Act; but shall be and remain as valid and effectual in law to all intents and purposes as if this Act had not been passed".

VI. SUMMARY OF PROVISIONAL CONCLUSIONS

70. We append here a summary of the provisional proposals made and questions raised in the Working Paper. We would welcome views and comments on these proposals and questions.

Proposed declarations in family matters[143]

(1) The court should be empowered by statute to make the following declarations (paras. 18-36):-

(i) that the applicant's marriage was, when celebrated, a valid marriage (paras. 22-23);

(ii) that English law recognises or, as the case maybe, does not recognise a foreign divorce or nullity[144] in respect of the applicant's marriage (paras. 30-31);

(iii) that the applicant is legitimate or has been legitimated pursuant to statute or at common law. We invite views as to whether legitimacy and legitimation declarations should be limited to the applicant's own status, or whether an applicant should be able to ask for a declaration that he or any other person is legitimate or has been legitimated

143. The tentative proposals do not abridge the existing powers of other courts or of other Divisions of the High Court to make declarations.

144. In view of the doubt expressed in para. 30 above, it may be that declaratory relief should be available in respect of decrees of nullity granted in the other law districts of the British Isles.

(para. 32). We also raise the question whether it should be possible to obtain a declaration as to the parent-child relationship in cases where the applicant does not claim the status of legitimacy or legitimation (para. 34).

(2) An applicant desirous of having it declared that his marriage, when celebrated, was invalid should be required to apply for a decree of nullity of a void marriage (para. 24). We propose that the applicant should not be able to apply for a declaration that his marriage was invalid if the marriage was celebrated in England and the court has no jurisdiction to entertain nullity proceedings (paras. 25-27).

(3) The existing statutory right to apply in the Family Division for a declaration of British nationality should be abolished (paras. 35-36).

Scope of declarations

(4) Only a party to a marriage should be entitled to apply for a declaration that the marriage was valid (paras. 23, 42), or for a decree of nullity of that marriage (paras. 59-62), or for a declaration as to the validity of a foreign divorce or nullity in respect of that marriage (para. 31).

(5) Proceedings for a declaration as to matrimonial status or for nullity of a void marriage should continue to be available after the death of a spouse (paras. 43-46).

(6) Declarations should operate in rem (paras. 37-38) and be obtainable as of right (para. 39).

(7) The dismissal of an application should not have any declaratory effect beyond binding the parties to the proceedings (paras. 40-41).

(8) Ancillary relief should not be available on the making of a declaration (paras. 55-56).

Jurisdiction

(9) The jurisdiction of the court to entertain an application for a declaration as to marital status (i.e. declarations (i) and (ii) in para. 70(1)) should be the same as that in nullity (para. 48).

(10) There should be jurisdiction to make a declaration of legitimacy or legitimation (i.e. declarations (iii) in para. 70(1)) if the applicant's domicile or habitual residenc is such as to give the court jurisdiction in nullity (para. 49).

Court hearing the application

(11) All applications should be commenced in a divorce county court and should be transferab to the Family Division in the same circumstan as matrimonial causes (paras. 57-58)

Procedural proposals

(12) There should be procedural safeguards designe to protect interested parties and the public (paras. 50-51 and Appendix).

(13) The same safeguards should be applied to proceedings for nullity of a void marriage (paras. 52-54).

(14) The applicant for a declaration should be required to disclose the existence of other previous or pending proceedings: existing provisions as to hearing in camera and restrictions on publicity in the case of applications under section 39 should apply to all applications for a declaration (Appendix).

Jactitation of Marriage

(15) The suit for jactitation of marriage should be retained until a satisfactory alternative remedy is made available (para. 63).

(16) On dismissal of a jactitation suit the court should not have power to make a declaration of validity of marriage in those proceedings unless the respondent desiring such a declaration is able to make an application in the ordinary way; the suit and the application could then be consolidated, if desired (para. 65).

(17) The jurisdiction to make a decree of jactitation of marriage should be the same as jurisdiction in tort (para. 66).

The Greek Marriages Act 1884

(18) The Act should be repealed and such marriages as might have been validated under the Act if application were made in respect of them should, subject to the limitations set out in the Act, be declared to have been valid (paras. 67-69).

APPENDIX

Proposed procedural safeguards in proceedings for declarations in family matters

1. The Treasury Solicitor (who acts on behalf of the Attorney-General in cases under section 39) has informed us that, whereas there are a few cases in which it is necessary for the Attorney-General to be represented at the hearing and to argue the case against the application, in most cases his preliminary investigations satisfy him that the declaration in question is a proper one to make and that there is no real necessity for him to take further part in the proceedings.[1] We think, therefore, that the existing requirement for the Attorney-General to be made automatically a party to every application is not necessary and, since we are proposing an increase in the number of cases in which th procedural safeguards should apply, a substantial amount of extra work would fall on the office of the Treasury Solicito without any real benefit to the public if he were obliged to investigate the circumstances of every application for a

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1. We are informed by the Treasury Solicitor that for the three years 1969-1971, the total numbers of applications were 29, 20 and 31 respectively: of these 28, 18 and 26 were applications made in the county court for a declaration of legitimation in most of which the Treasur Solicitor found, after making his investigations, that, subject to calling formal evidence, a declaration could properly be made.

declaration or for a decree of nullity of void marriage.[2] Therefore, we would propose that it should not be necessary to make the Attorney-General a party to each application and, instead, the Treasury Solicitor should be empowered to intervene in the suit on behalf of the Attorney-General, either upon a reference from the Registrar or of his own accord.

2. We provisionally propose that the following procedure might be adopted:-

(a) Every applicant for a decree of nullity of void marriage or for a declaration as to the validity of a marriage or as to the validity or invalidity of a foreign decree of divorce or nullity should in the first instance make the other spouse to the marriage in respect of which the decree or declaration is sought a respondent to his application; in the case of

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2. Statistics as to declarations and decrees of nullity of void marriage for the last three years available are -

	Declarations under s. 39	Declarations under O.15,r.16	Decrees of nullity of void marriage
1969	29	30	98
1970	20	32	95
1971	31	26	76
annual average	27	29	90

N.B. The figures as to declarations are from June of the year stated to June of the next year; the figures for decrees of nullity are in respect of calendar years.

an application for declaration of legitimacy or legitimation the applicant should make both parents (if alive) respondents.

(b) The applicant should then issue a summons for directions supported by an affidavit verifying the application and giving particulars of every person whose interest may be affected by the proceedings and his relationship to the applicant.

(c) The Registrar should have discretion to direct that notice of the application be given to the Treasury Solicitor in the following cases:-

(i) where the result of the application may affect British nationality or a British title of honour;

(ii) where there is involved a point of law on which argument would be helpful;

(iii) where there is no respondent;

(iv) where a respondent or an interested person cannot be served, or if served cannot reasonably be expected to take part in the proceedings even if desirous of doing so (e.g.where he is under a disability, or where he is in a country where for political or other reasons he is deprived of normal opportunities to take part);

(v) where there is a special reason making it advisable as a matter of public policy that notice should be given to the Treasury Solicitor.

The Registrar's power to direct that notice of the application be given to the Treasury Solicitor should be exercisable not only at the hearing of the summons for directions but at any time during the progress of the suit before trial.

3. We would also propose that the Treasury Solicitor should of his own accord be allowed to apply for leave to intervene in the suit where this is considered necessary or desirable. It could well be that information might come to the attention of the Treasury Solicitor which would not necessarily be before the Registrar (who would, had he known of it, have ordered that notice be given to the Treasury Solicitor). The Queen's Proctor has a similar power in relation to proceedings for divorce, nullity and presumption of death and dissolution of marriage, and it seems reasonable that in appropriate cases the Treasury Solicitor, whose concern would be to protect the interests of the Crown and the public, should be allowed to intervene on behalf of the Attorney-General.

4. The procedure outlined above is very like the procedure applicable in cases under section 39,[3] save that neither the Attorney-General nor any interested party (other than an original respondent) would be made a party to the proceedings, but would himself decide whether to intervene. This proposed procedure is not intended to affect the existing position whereunder the trial judge can invite the Queen's Proctor to appear as amicus curiae or the Queen's Proctor can intervene to show cause why a decree nisi of nullity should not be made absolute.

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3. Section 39(7); R.S.C., O.90, rr. 14-15.

5. Two final matters. First, we think it should be made clear that on every application for a declaration the applicant should be required to give particulars of any previous or pending proceedings with reference to any marriage in question[4] or to the matrimonial status of either party to it. This information is certainly relevant to the application and may sometimes be relevant to the court's decision whether to adjourn the application, if thought fit.[5] Secondly, we think that the existing provisions as to the court being able to hear a case in camera and as to restricti on publicity, which now apply only to applications under section 39, should apply to all applications for declarations in family matters.

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4. This will be the applicant's own marriage where he is asking for a declaration of its validity or for a declaration of the validity or invalidity of a foreign decree in respect of it; it will be that of the applicant's parents' marriage where he is applying for a declaration of legitimacy or legitimation.

5. This information is already required in the case of an application under Order 15, rule 16, but not, it seems, in the case of an application under section 39: R.S.C., O.90, rr. 13-15.

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